II. INTEREST OF ASSOCIATED BUILDERS AND CONTRACTORS, INC.

Associated Builders and Contractors, Inc., herein at times called ABC, is a Maryland non-profit association with headquarters at Glen Burnie, Maryland. It has chapters in 15 states and represents approximately 3800 members. Its membership consists of contractors, subcontractors and other business enterprises, such as suppliers, dealers and financial institutions who are involved in construction.

ABC has long taken a great interest in labor legislation and in cases that arise under the National Labor Relations Act as amended. Most of its members fall in the category of small business, and there is always special concern among ABC members when they view a small-business contractor in the construction field having serious problems under the Act. In the instant case it appeared to ABC that the resources of the respondent, a man engaged in small business in the construction industry, would of necessity be quite limited. Hence ABC desired to share responsibility in this matter by filing this amicus curiae brief.

III. QUESTIONS PRESENTED

1. Should the decision of the Eighth Circuit Court of Appeals denying enforcement be affirmed because, apart from other considerations, the findings and order of the National Labor Relations Board with respect to a violation of Section 8(a)(4) are not supported by substantial evidence?

2. Would enforcement of the Board's order as to Section 8(a)(4) promote the purposes of the Act?

3. Does the history of Section 8(a)(4) indicate whether it has application to statements given a Board agent prior to the issuance of charge and complaint?

IV. STATUTES INVOLVED

1. Section 7 and Section 8(a)(1) and (4) of the National Labor Relations Act, as amended, are accurately set forth on page 2 of the brief of the National Labor Relations Board and will not be repeated here. In addition a portion of Section 10(f) of the Act is involved. Such portion states that "the findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall in like manner be conclusive."

2. Section 10(e) of the Administrative Procedure Act. (60 Stat. 237, 243, as amended; 5 U.S.C. 706) The relevant portion of this Section provides that the reviewing court shall:

> "hold unlawful and set aside agency action, findings, and conclusions found to be (1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; . . . (3) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right . . . (4) unsupported by substantial evidence. . . ."

3. The National Industrial Recovery Act, Ch. 90, 48 Stat. 195 (1933).

4. The Wagner Act, 49 Stat. 449 (1935).

V. STATEMENT

The facts as set forth in the Board's brief omit certain important events and developments and cast everything in a light highly unfavorable to the respondent. The respondent's brief sets forth an accurate and realistic statement of facts as supported by the record. Amicus adopts such statement of the respondent and also sets forth the following parallel and additional facts which amicus urges should be considered by the Court.

Respondent is an electrical contractor in residential and commercial construction in Springfield, Missouri (A 218, 220-221; 10, 11, 132). On or about March 15, 1968, Local 453, International Brotherhood of Electrical Workers, AFL-CIO, began picketing an apartment building on which the respondent was working (A 161), and continued to picket it for about two weeks (A 138). On March 18, 1968, five of the respondent's employees signed authorization cards in designation of the union (A 255-256, 6-8, 19, 50, 59, 78, 85). At least one of the employees understood that the purpose of the signature was to obtain an election (A 112). The local business manager, Jack Moore, asked Scrivener the evening of that same day to come to his office. Scrivener did so the next morning (A 133). Moore placed the signed cards before Scrivener on a desk (A 143). Scrivener testified that he had some doubts about the genuineness of the signatures, although he did not say so to Moore (A 144-145). He inquired of Moore what Moore wanted him to do and the reply was to "file a collective bargaining agreement with us." (A 9) Moore's assistant, Ray Edwards, gave Scrivener a copy of a contract between the Springfield Division of National Electrical Contractors Association, Inc. and Local Union No. 453 (A 134, 195). Scrivener apparently was not a member of the Association and Moore wanted him to sign a letter of assent to the Association Contract (A 165, 166). Scrivener testified that Moore told him he wanted an answer about the contract about 6 o'clock that evening (A 134). Moore and Edwards denied that Moore made such a demand (A 12, 160).

On Wednesday, March 20, Scrivener gave card signers Bill Cockrum, Wesley Smith and Albert Wilson their pay checks. Scrivener told the employees, "I never did work for a non-union shop. You are jeopardizing yourself." (A 135) Scrivener had himself been a member of Local 453 about 18 to 20 years (A 145). On cross-examination Scrivener testified, "I did not want them getting them-

selves in trouble for me, which I know in my mind is a violation, to work for a non-union shop." (A 148)[1]

The testimony is uncontradicted that Scrivener told these three men before they left to come back the next morning. With respect to this conversation the uncontradicted testimony of Wilson on cross-examination follows:

> "Q. Regardless of what was said there at the time you received your check that evening, at least you admit that Mr. Scrivener told you to come back the next morning.
>
> A. That's right, but he told me and Wesley and then he hollered out to Bill as Bill was getting into his truck.
>
> Q. And there wasn't even a lapse of how much time then?
>
> A. Oh, maybe—well, it was three or four minutes. We had to pick our tools up." (A 71)

On about March 20 Scrivener hired Clyde Hunt, a journeyman, and Jim Statton, a helper (A 150). Statton was a new employee, but Hunt had worked for Scrivener before (A 136; 146). He was working for Scrivener when Wesley Smith began work for him, having worked for him about seven months prior to the events of March, 1968 (A 146; 136). Also working for Scrivener at the time was Boyd Perryman, a helper (A 138).

The union filed charges with the Board on Thursday, March 21, alleging that the respondent had violated Section 8(a)(1), 8(a)(3) and 8(a)(5) of the Act (A 169).

On Friday, March 22, Scrivener wrote letters to Bill Cockrum, Smith and Wilson. He stated a desire to clarify

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[1] Article XXVII, Sec. 1 (21) of the 1970 IBEW Constitution states that members may be penalized on account of "working for any individual or company declared in difficulty with a L.U. (local union) or the IBEW in accordance with this Constitution."

the situation—that he had not discharged them and they were "free and welcome to work for me as usual at any time." (A 232) He invited them to return to work the next Monday morning. Scrivener stated in the letter that he had merely wanted to report to the men what Jack Moore told him when he demanded a signed contract —that Scrivener would be required to hire all men through the hiring hall (A 232). Moore denied that he ever made such a statement, although Scrivener reiterated the contention when he testified that Moore told him after the cards were signed that "it looks like you've got five new employees. If you want me to I'll send them to you at noon." (A 145)

When recalled to the witness stand and as the last witness at the hearing, Moore also testified: "What has always been the practice is, if we have guys sign authorization cards, *till we have a contract with that employer*, we leave him there to work." (A 165) (Emphasis supplied).

The three employees returned to work on Tuesday, March 26, as they did not receive the letters in time to go to work on the Monday preceding. Bill Cockrum who had worked for Scrivener only since about February, 1968, was laid off a day later and did not return to work. He was selected for lay-off through a drawing of straws (A 137, 138; 48).

A remaining two of the five card signers, Don Cockrum and Claude Sanders were not laid off and continued their employment without interruption until April 18th. Albert Wilson and George Smith also worked continuously until April 18th except for a day of illness by Wilson and a short lay-off by Smith of the days between March 27 and April 1 (A 64; A 74; A 26; A 27).

The evening of April 17 a Board representative met with Bill and Don Cockrum, Smith, Sanders and Wilson (A 64). He took affidavits about the case from three or

four of them (A 53; 64). Wilson testified that when he went to work the next morning Scrivener motioned him into his office and inquired if "you guys" met with the Labor Board man the night before; also, that when he and Don Cockrum were getting their materials together Scrivener again inquired about their meeting (A 65). Sanders likewise testified that Scrivener queried him as to whether "the boys" had found out anything the night before (A 81). Scrivener on the other hand testified he did not know the five men had talked to the Labor Board investigator until "on April 20th when Wesley Smith told him." (A 141). Meanwhile on April 18th he laid off Don Cockrum, Smith, Wilson and Sanders (A 27; 65-66; 80-81; 96). Scrivener testified the reason the men were laid off was "just lack of work." (A 141)

Wilson testifying about the layoff stated: "He said if there was anything to do, he'd see what came up over the weekend and he'll call and to give him a phone number. So I gave him the phone number so he called me." (A 65) Wilson went back to work on May 4th, pursuant to Scrivener's call and worked until May 10th, when either he quit or was laid off (A 74-75; 139).

Smith went back to work on May 4th and was still working for the respondent at the time of the hearing on June 25th (A 29). He testified that he had been laid off occasionally even prior to March 15th (A 34). He testified on direct that when he was laid off in April, Scrivener had some residential jobs going but he couldn't say exactly how many or how many he had worked on (A 28). He testified also that there was work on an eleven-unit apartment building, the rough-in part being almost completed (A 28). Asked on cross-examination if it wasn't "a fact that work was slow at those times when you were laid off, that the work was pretty well caught up," Smith replied, "Well, I don't know, I just don't know what comes in the shop." (A 46) Sanders

was asked on cross-examination, "At any time that Mr. Scrivener laid you off, isn't it true that business was slack or the work was slack?" (A. 83) Sanders replied, "Well, I couldn't say as to that because we finish up on one job and there's always something else. But then maybe—I don't know." (A 84) Sanders went to work for another employer three or four days after the April 18th layoff and was still working there at the time of the hearing. The new job is less exacting of physical labor than the one with Scrivener. Donald Cockrum's statement given to the NLRB investigator indicated there were at least three houses being roughed in on April 18, although in his testimony he said there might have been more or less than three (A 98). Cockrum went back to work for Scrivener on April 30th and was working for him at the time of the hearing (A 100). He had not been a steady employee of Scrivener, but had worked for him four or five times over a period of approximately three years (A 85). Perryman, Statton and Hunt had continued to work for Scrivener from the time of their employment in March (A 140, 141).

The union filed an amended charge on May 13, 1968, alleging the respondent terminated the employment of Don Cockrum, Albert Wilson and George Smith on or about April 18, 1968, inter alia, because they gave testimony in the case. A complaint in turn was issued on or about May 17, 1968, which alleged inter alia, that the respondent laid off Donald Cockrum, Albert Wilson, George Smith and Claude Sanders, because they met with and gave evidence to an agent of the Board. The complaint also alleged that since on or about April 18, 1968, the respondent has failed and refused to reemploy Albert Wilson, George Smith, and Claude Sanders to their former or substantially equivalent positions.

VI. SUMMARY OF ARGUMENT

Apart from the refusal of the Circuit Court of Appeals for the Eighth Circuit by reason of its conclusion that the language of Section 8(a)(4) does not apply to the facts of this case, it is submitted that in any event substantial evidence is lacking to support the allegations of the complaint directed to that section and any derivative 8(a)(1) allegations. In addition, it can hardly be said that it is promoting the purposes of the Act as described in its preamble for a powerful federal agency to build up and pursue these controverted charges of 8(a)(4) violation against so small an employer. The history of Section 8(a)(4) indicates it was in fact enacted for the limited purpose of protecting those who file charges or give testimony. To expand the language to protect others would be a form of judicial legislation.

VII. ARGUMENT

A. The Lack of Substantial Evidence

The Trial Examiner found Scrivener's explanation of why he made the layoffs on April 18th to be unconvincing, Scrivener's explanation that he was short of work not being credited. The Board agreed. The Trial Examiner affirmatively found and the Board brief states there were jobs to be done and that employees Perryman, Hunt and Statton were kept at work.

As the trial examiner stated in his decision, "Scrivener is entitled to run his business in any manner he desires as long as it does not discriminate unlawfully against his men."

What was Scrivener's practice? One basic practice he made clear in his testimony as quoted in the facts above, was that when his employees had jobs going he "wanted them to finish their own jobs, which has always been anyone's practice." There is not one iota of evidence in

the record to refute Scrivener's contention that this was his business practice. Had this testimony not been correct, Board counsel could easily have refuted it by counter testimony from the employees. The Trial Examiner, moreover, contradicts his own reasoning about Scrivener's right to manage his business because he undertakes in his decision to require Scrivener to transfer his men from job to job, journeymen being able, he maintained, to pick up a job at any point and follow it through. There is force in the Trial Examiner's contention, but if Scrivener had handled his business another way there is no rule of law that requires him to change his method.

Indeed, whether there were jobs for the four employees to do when they were laid off is far from established by the evidence. The Trial Examiner's decision, adopted by the Board, is vague on the subject. It found that "the men were on jobs at the time and there was some other work such as the apartment house still to be done." The Board brief goes farther than the Trial Examiner-Board decision. It states that "the Company had substantial work to complete in at least three houses and one 11-unit apartment building." The figure of "at least three houses" was gleaned apparently from Don Cockrum's statement. This statement is uncorroborated and the Trial Examiner spent a considerable portion of his decision trying to determine whether Cockrum's testimony should be credited. Whether as a matter of fact there was work for any of the employees at the 11-unit apartment building is by no means established by the evidence. The most definite reference to the nature of the work there on April 18th was that it was being roughed in. Did this fact make possible or preclude work on it by the four laid-off employees? The evidence does not show. Nor does it show what effect the picketing had on the apartment house project even though apparently it had been lifted by April 18th. Attempts by respondent's

counsel to develop more facts about the picketing were held improper.[2]

Moreover, not one of the four laid-off employees testified that he was on a job yet to be completed when he was laid off on April 18th. Had they been working on such jobs it was incumbent on Board counsel to elicit such facts from them.

In determining that the separations on April 18th were discriminatory the Trial Examiner admitted the evidence was circumstantial (A 236). He stated that he considered the prior discharges in arriving at his decision (A 235). He did not patently consider certain contradicting evidence that is highly important. The facts are that two of the five card signers, Don Cockrum and Sanders, worked without interruption through the events of March and until April 18th. The three others were definitely told when they were given their pay checks on March 20 to come back to work the next morning and this statement to them was reiterated in a letter which asked them to return to work the following Monday, March 25th. They actually did return to work on Tuesday, March 26th.

The findings of the Trial Examiner lay stress on Scrivener's discussions with the employees about the union during the March events as showing a purpose to discriminate. It was Scrivener's constitutional right to express his opinions about the situation as long as they were not coercive.[3] The tenor of his discussions with his employees about the union was that he as a former union member had not worked for a non-union shop and the men were jeopardizing themselves. There is evidence in the record that it was indeed a violation for a member

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[2] See cross examination of Roy Edwards (A 162-163).

[3] *NLRB* v. *Virginia Electric Power Co.*, 314 U.S. 469 (1941); *NLRB* v. *American Tube Bending Co.*, 134 F2d 993 CA-2 (1943), Cert. Den. 320 U.S. 768 (1943).

of Local 453 to work for a non-union employer.[4] It is likewise tenable that Scrivener could have feared that once he assented to the contract with Local 453 it would send him other employees. Indeed Article VIII of the contract which Moore presented to Scrivener provided that the "union shall be the sole and exclusive source of referrals of applicants for employment."

Under all the circumstances, was it reasonable and a requirement of the National Labor Relations Act that Scrivener say nothing to express his concern? In this connection it is important to consider the 1947 amendment of Section 8(c) of the Act which reads as follows:

"The expressing of any views, argument, or opinion, or the dissemination thereof, whether in written, printed, graphic or visual form, shall not constitute or be evidence of an unfair labor practice under any of the provisions of this Act, if such expression contains no threat of reprisal or force or promise of benefit."

Scrivener's comments were somewhat like those of an employer who told his employees they might not qualify to hold their jobs under a union area contract because of the required ratio of journeymen to apprentices. These remarks were held to be protected as free speech. *Snap Out Binding & Folding, Inc.*, 166 NLRB 316, 325, 326 (1967).

Similarly a statement to an employee that if a union got in there might be more money per man but less work because employees would be sent home after their work for the day was completed, instead of being assigned to other departments, was held lawful. *Cardinal Extrusion Co.*, 136 NLRB 615, 620 (1962).

Also protected as free speech was an employer statement that the union was interested only in initiation fees and dues, and customarily pays off the company whose

[4] Testimony of Billy A. Cockrum (A 56).

employees it represents so that company will hire and fire unusual numbers of employees so that union may obtain more initiation fees. *Redwing Carriers, Inc.*, 165 NLRB 60, 66, 67 (1967).

Thus Scrivener's remarks to his employees about the union were like the cases quoted above, mere predictions or opinions about their economic future if they went along with the union. They were in no sense threats, and under the circumstances should not be considered violations of the Act.

The standard of review laid down for the Court in cases such as instant case was explained in *NLRB* v. *Pittsburgh S.S. Co.*, 340 U.S. 498 (1951), and *Universal Camera Corp.* v. *NLRB*, 340 U.S. 474, 490 (1951). The Court in the latter case reversed and remanded an order of the Board in which the Board had overruled its Trial Examiner and found an employee to have been discharged for giving testimony in a prior case. Reviewing the history of the Administrative Procedure Act and the Taft-Hartley Act, the decision of the Court stated in part:

"We conclude, therefore, that the Administrative Procedure Act and the Taft-Hartley Act directs that courts must now assume more responsibility for the reasonableness and fairness of Labor Board decisions than some courts have shown in the past. Reviewing courts must be influenced by a feeling that they are not to abdicate the conventional judicial function. Congress has imposed on them responsibility for assuring that the Board keeps within reasonable grounds. That responsibility is not less real because it is limited to enforcing the requirement that evidence appear substantial when viewed, on the record as a whole, by courts invested with the authority and enjoying the prestige of the Court of Appeals. The Board's findings are entitled to respect, but they must nonetheless be set aside when the record before a Court of Appeals clearly precludes the Board's

decision from being justified by a fair estimate of the worth of the testimony of witnesses or its informal judgment on matters within its special competence or both."

Commenting on the rule as laid down by *Universal Camera Corp.* v. *NLRB*, the Court in *NLRB* v. *Isis Plumbing & Heating Co.*, 322 F2d 913 CA 9 (1963) stated:

"Under the rationale expressed in Universal Camera, supra, it is our duty in determining the substantiality of evidence supporting a Labor Board decision, to take into account contradictory evidence or evidence from which conflicting inferences could be drawn.

"The substantiality of evidence must take into account whatever in the record fairly detracts from its weight . . ."

In addition to the contradictory evidence discussed above in support of the respondent the following facts are also worthy of consideration:

1. Scrivener laid the men off at the close of the day on April 18th. Had he wanted to retaliate for what they did the night before he would more likely have laid them off at the beginning of the day.

2. He volunteered to see what would come in over the week-end and in fact put three of the four back to work shortly, Cockrum on April 30th, Wilson and Smith on May 4th. Smith and Cockrum continued to work there. Sanders obtained other less strenuous employment and did not return. Wilson's work was discontinued about May 10th, but there is no allegation or evidence of discrimination against him with respect to that separation from employment.

3. The three were reinstated before the amended charge was filed. Hence, the reinstatements were voluntary and not caused by NLRB action.

Under all the circumstances it is submitted that the substantial evidence required by Section 10(f) of the

National Labor Relations Act, as amended, and by Section 10(e) of the Administrative Procedure Act was lacking. In similar circumstances both the Courts and the Board have found in favor of the employer.[5] The allegations directed to Section 8(a)(4) and any derivative 8(a)(1) allegations should be ordered dismissed.

B. The Purposes of the Act

It is submitted that what the Board is undertaking in this case contributes nothing toward promoting the purposes of the Act, Section 1 under the present Act as under the Wagner Act concludes with the following language:

"It is hereby declared to be the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate these obstructions when they have occurred by encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or for other mutual aid or protection."

It is a conservative statement to observe that no *substantial* obstruction to the free flow of commerce was involved in this case. The Board concedes the respondent does not come up to its jurisdictional standards for the construction industry. Hence, how does the great zeal to push the case happen to arise? Why does the Board

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[5] *NLRB* v. *Isis Plumbing & Heating Co.*, 322 F2d 913 CA-9, 1963; *Standard Electric Co.* v. *NLRB*, 387 F2d 717 CA-5 1968; *NLRB* v. *Sunbeam Lighting Company, Inc.*, 318 F2d 661, CA-7, 1963; *General Adjustment Bureau* v. *NLRB*, 331 F2d 913 CA-7, 1963; *NLRB* v. *The Newton Co.*, 236 F2d 438 CA-5, 1956; *Harris Hub Co.*, 142 NLRB 287 1963; *Henrich Lumber, Inc.*, 100 NLRB 1270, 1952; *Fashion Fair, Inc.*, 163 NLRB p. 97, 1967; *Lowell Sun Publishing Co.*, 136 NLRB 206 1962; *Tru-Scale Products, Inc.*, 147 NLRB 1122, 1964; *Western Lace & Line Co. d/b/a; Western Fishing Lines Co.*, 103, NLRB 1408, 1953.

spend itself taking statements from the employees? It was on notice that there was a lack of jurisdiction, yet its agent spends his time interrogating and obtaining these statements. In turn the Board tries to build a case on the assumption that employees were entitled to protection with respect to these statements that should not have been taken in the first place. The facts as reviewed earlier in this brief are by no means convincing that the layoffs on April 18th were discriminatory.

Under all the circumstances it is submitted that the purposes of the Act are not served by the insistence of the Board that it pursue this case.

C. The Meaning of Section 8(a)(4) as Revealed by Its History

The language in Section 8(a)(4) is very narrow and restrictive. To commit this unfair labor practice an employer must come under the language:

> "to discharge or otherwise discriminate against an employee because he has filed charges or given testimony under this Act."

The recently published book, The Developing Labor Law stated, regarding Section 8(a)(4) that "the narrow scope of the unfair labor practice is to be noted. The reason for the discrimination must be that an employee has filed charges or given testimony under the Act. Planning to file charges or testify does not come within the language of Section 8(a)(4)."[6]

This narrow language was in the Wagner Act of 1935 and was then known as Section 8(4). In the Taft-

[6] Published by the Bureau of National Affairs, Inc. at the instance of Section of Labor Relations Law, American Bar Assn. (1971), page 134. Also see *Ogle Protection Service, Inc.*, 149 NLRB 545, 566 (1964), cited by the respondent wherein the trial examiner's decision, adopted by the Board, stated: "Since the discrimination does not come within the *precise language* of Section 8(a)(4), therefore, I make no finding of a violation thereof." (emphasis supplied)

Hartley amendments of 1947 and the Landrum-Griffin amendments of 1959 the language was carried forward without change, and it remains the same today as when originally enacted.

In reporting out the bill which became the Wagner Act, the Senate Education and Labor Committee stated regarding this section of the law:

> "The fourth unfair labor practice, which prohibits the discharge or discrimination against an employee for filing charges or giving testimony under the bill is self-explanatory." [7]

Senator Wagner in comments at committee hearings and in debate on the Senate floor regarding the section had made an identical observation.[8]

The concept for the language came from activities that arose pursuant to the National Industrial Recovery Act. One of the Senate Education and Labor Committee Reports issued during the 74th Congress in fact referred to the executive order issued pursuant to the N.I.R.A. as having the following language:

> "No employer subject to a code of fair competition approved under said title shall dismiss or demote any employee for making complaint or giving evidence with respect to an alleged violation of the provision of any code of fair competition approved under said title."

The report mentioned the language before the Congress in the Wagner Act, as a reiteration of that in the Executive Order.[9]

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[7] *Report No. 573*, Senate Education and Labor Committee, 74th Congress, 1st section, page 12.

[8] *Hearings on H.R. 6288* of House Com. on Labor, 1st Session, 74th Congress, March 13, 1935, p. 14; Senate debate, May 15, p. 935, *79th Cong. Record 7571*.

[9] See page 29 of document mentioned in footnote 10 infra.

In a Senate Committee Report commenting on Section 8(4) as set forth in the draft bill before the Senate Education and Labor Committee, there was the following observation:

> "The need for this provision is attested by various decisions of the National Labor Relations Board (matter of New York Rapid Transit Corporation, decided Nov. 21, 1934; matter of Zenith Radio Corporation, decided Nov. 26, 1934; matter of Ralph A. Freundlich, Inc., decided Feb. 13, 1935)." [10]

The Board argument about the purport of these cases as set forth on page 13 of its brief can be misleading. The New York Rapid Transit case is cited as support for the proposition that giving affidavits was a protected activity under the language of the National Industrial Recovery Act. The clear implication, therefore, is that giving an affidavit under the present Section 8(a)(4) of the National Labor Relations Act is protected. However, a careful reading of Public Resolution No. 44 of the 73rd Congress and the related Executive Order of June 29, 1934, creating the National Labor Relations Board of the pre-Wagner Act era shows no reference to the use of the charge as it is known under the Wagner Act. Hence, the filing of the affidavits in the New York Rapid Transit case may be viewed as similar to the filing of a charge under present law. As for the protection afforded an employee in the Freundlich case who had testified in a state court, many of the matters incident to the National Industrial Recovery Act were tried in state courts and the language of the Act as quoted above was clearly and rightly broad enough to protect such activity.

Hence the examples from N.I.R.A. days as cited in the Board's brief in the final analysis protected employees as to activities that were the equivalent of filing charges

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[10] *Comparison of S. 2926 and S. 1958* of 73rd and 74th Congresses, respectively, in Report of Senate Education and Labor Committee of 74th Congress, 1st Session.

or giving testimony under the National Labor Relations Act, as amended.

When Congress enacted the Wagner Act in 1935 it tailored the language to fit precise situations that would arise under the Act. Using exact and restrictive wording in the then Section 8(4) it protected employees against discrimination for filing charges or giving testimony. Sections 10(b) and 10(c) of the Act in turn clarify what is meant by the filing of charges and giving testimony under the Act.[11]

Had Congress wished to broaden the rule it incorporated in the law, it is reasonable to assume it would have used broader and less restrictive language rather than narrow it to the precise acts of filing charges and giving testimony. To broaden this language as the Board would have us do is something to be presented to the Congress, not to the Courts.

The early cases, moreover, indicate that those who administered the law at the outset dealt with cases that regarded this language literally. The early reported cases had to do with discrimination that arose from the specific language used in the law, to wit, the filing of charges.[12]

One purpose of Section 8(a)(4) should be to give the utmost protection to employees who are "put on the spot" and have to testify. In this connection, *Pedersen* v. *National Labor Relations Board*, 234 F2d 417 (1956) cited by the Board in its brief makes the point that the protection of the employee should be as broad as the Board's subpoena power. Once an employee is given a Board subpoena he should have all-out protection of Section 8(a)(4). The 8(a)(4) allegation in this case, however, embraces no employees under any sort of compulsion.

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[11] 49 Stat. 449 (1935).

[12] See *Albert J. Barston & TWOC*, 23 NLRB 666, May 8, 1940; *F. W. Poe Manufacturing Co. & TWU*, 27 NLRB 1257, Nov. 8, 1940; *The Kramer Company & ILGWU*, 29 NLRB 921, Feb. 20, 1941.

They voluntarily gave a Board agent statements that should not have been elicited in the first place. The language of the Section does not apply and the situation shows no urgent need for its application.

VIII. CONCLUSION

Amicus respectfully submits that the refusal of the Court of Appeals of the Eighth Circuit to enforce the Board's order in this case should stand. Apart from other considerations there is a lack of substantial evidence to support the Board's findings and order. Pursuit of the case will not promote the purposes of the Act. The decision of the Eighth Circuit in *National Labor Relations Board* v. *Ritchie Manufacturing Co.*, 354 F2d 90 (1966) is a sound precedent in line with legislative history as following the precise and clear wording of Section 8(a)(4), especially as applied to the facts of the instant case. To follow the reasoning of the Board would result in judicial legislation, contrary to the constitutional guarantee of separation of powers.

Respectfully submitted,

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December 22, 1971

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1971

No. 70-207

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

vs.

ROBERT SCRIVENER, D/B/A AA ELECTRIC COMPANY,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF FOR RESPONDENT

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